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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 670.

TEXAS AND NEW ORLEANS RAILROAD COMPANY *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellees:*

Appeal from the United States District Court for the Western District of Missouri, Western Division.

APPELLANTS' REBUTTAL BRIEF.

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Appellants do not consider that the statement of the issues and the facts made by appellees in their brief constitute an adequate or proper recitation thereof, and they hence prefer to rest their appeal upon their own analysis of what is involved in this cause.

In the final analysis, we are driven to the conclusion from a review of the brief for appellees that they are asking this Court to hold that the Interstate Commerce Commission, after having once upon due hearing prescribed and enforced over a period of years a given rate or rate system, has the power by its mere *ipse dixit* to declare such rate or rate system to be unreasonable and thereupon to substitute therefor another and different rate or rate system. But with that thesis appellants find themselves unable to agree.

Appellants do not question the power of the Commission under appropriate evidence or proof to change or correct a prior finding or order shown to be wrong or outmoded, but they do say most emphatically that, when in the course of human events the Commission comes to the conclusion that a rate once prescribed by it should be canceled and a different rate (whether higher or lower) substituted in its place, a decent respect to the opinions of mankind requires that it proclaim explicitly the reasons by which it is actuated in so doing, the reasons so assigned to be supported by substantial evidence. This, in view of the legal verity that attaches to the lawful findings and orders of the Commission, we believe to be fundamentally sound and indubitably correct.

In *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, this Court was called upon to determine whether the Commission could lawfully effect retroactively a revocation of a prior finding as to the reasonableness of a given rate, but we do not call to mind any instance where the Supreme Court has had occasion heretofore to outline what conditions must obtain before the Commission will have sufficient legal warrant to revoke a prior finding or order invested with the force and sanction of statutory authority. That precise question was considered by the Commission itself, however, in *Traffic Bureau of Nashville* v.

R. R. Co., 43 I. C. C. 366, 369, in which it was declared in a well reasoned opinion that a conclusion once reached by it will be adhered to unless (a) some new facts are brought to its attention, (b) conditions are shown to have undergone a material change, or (c) it proceeded on a misconception or misapprehension.

Appellants are wholeheartedly willing to accept the foregoing pronunciament of the Commission as the proper test of the legal validity of its assailed orders herein under review. Appellees have not met the challenge to point out wherein the voluminous evidence adduced at the 1928 and 1932 hearings warrants the condemnation of the rates on horses and mules in the Southwest that were prescribed or authorized in the 1924 and 1925 orders of the Commission. Most assuredly there is a pronounced absence in the Commission's 1933 report of any substantive finding that a single one of the above three cardinal requirements had been satisfied.

For example, in the 1924 report the Commission commented (page 486) upon the contention of the defendant carriers that the rates on horses and mules should properly be higher than on cattle because of the lighter volume of movement of the former (this, however, was overlooked in the 1933 report), because of the higher per car value of horses and mules, and because they are more susceptible to damage in transit than cattle. Mention was also made (pages 482 and 492) of the desire of the complainants for rates on horses and mules which would not exceed 115 per cent of the corresponding fat cattle rates, and reference was made to the *South Dakota* and *Nebraska cases*, in which that rate relation was fixed. The Commission likewise rejected the Kansas City-St. Louis rate (pages 486-87) as affording the proper measure of a normal rate for that distance in the Southwest. It is precisely these circumstances, however, that were cited in justification of the 1933 decision.

Again, the Commission in 1925 authorized the addition to the basic southwestern scale of arbitraries for the hauls in differential territory on account of the more adverse operating conditions there encountered, yet we look to the 1933 report in vain for any finding that since then any new facts indicative of a change in the *relative* conditions in the two rate groups.

Secondly, the Commission does not base its 1933 report and order upon any finding of a material change in conditions. Nor, thirdly, do we find the slightest intimation that the antecedent decisions proceeded on a misconception or misapprehension on the part of the Commission. Indeed, so confident was that tribunal of the propriety of the rates it originally prescribed or authorized that by order (R. 962) dated February 6, 1928, after the pending cases had been reopened for further hearing on January 4, 1926, but before such further hearing was held, it specifically restricted the scope of the further proceedings to the reasonableness of the rates in the future.

There is therefore no issue between appellants and appellees as to the right or power of the Commission *where conditions so warrant* to revise and modify rates once prescribed by it;—the position of appellants is that there are no conditions, nor evidence of changed conditions, to support the orders herein under review.

We deem it unnecessary to answer in detail the various arguments advanced by appellees in attempted justification of the assailed orders of the Commission, much of which is indeed amply taken care of in the opening brief of appellants. The subjoined discussion will therefore be confined to a few points which appear to call for special comment.

It will suffice to say in answer to Point I in appellees' brief that the record does not support their contention that appellants were accorded a full hearing and that the assailed orders were fully supported by the evidence and the findings. A full hearing contemplates not only an oppor-

tunity to be heard but also a fair and impartial consideration of the evidence and argument presented, and the latter appellants did not have. Some of their most important evidence, their rate comparisons, was dismissed on the peremptory assertion that rates on different classes of traffic were improperly sought to be compared. That, we submit, is an insufficient reason, since a dispassionate consideration of such evidence would have compelled a continuation of rates no lower than those prescribed or authorized in 1924 and 1925. This likewise answers Point II urged by appellees.

The only answer we care to offer to Point III is to repeat that, irrespective of whether there is any analogy of transportation conditions incident to edible and non-edible livestock, respectively, to whatever extent that the rates prescribed on edible live stock were influenced by circumstances other than transportation conditions they afford no proper yardstick by which to measure the rates on horses and mules unless the latter traffic is subject to substantially the same conditions. Appellants emphatically challenge the claim that the arbitrary fiat of the Commission (pages 43-44 of brief) that the rates previously prescribed "were unreasonably high and that the rates prescribed for the future are reasonable" constitutes "the only essential finding necessary to the validity of the order attacked in this suit."

Regarding the allusions of appellees on pages 37-38 of their brief to the absence of an attack by the carriers upon the edible livestock rate order, attention is directed to the fact that the Commission was at pains to detail the economic distress of that industry, which this Court has declared is a factor that may properly be taken into account in the fixation of rates, *Ann Arbor R. R. Co. v. United States*, 281 U. S. 658, 666-67. But like economic distress has not obtained as to horses and mules, nor has the Commission made any finding that it has. The underlying conditions were wholly disparate.

As respects Point IV, appellants make no claim to "a vested right to charge a higher rate in a particular artificially prescribed area than elsewhere." They do insist, though, that some justifiable reason must be assigned by the Commission in support of an order requiring that rates fixed as reasonable in a given rate territory must be observed in another rate group in which much more onerous transportation and operating conditions are encountered.

Appellees' argument under Point V is both misleading and superficial. They say that the Commission granted appellants the desired and necessary fourth-section relief, which is correct, but they fail to inform the Court that such relief is only temporary and that appellants must yet assume the burden and expense of submitting the proof called for by the Commission's Rules of Practice to justify a further order granting them permanent relief. Appellees further fail to take heed of the fact that only the rates to and from the market points were subject to the active jurisdiction of the Commission, and that under the issues in the consolidated cases it was without authority to compel appellants by an order entered pursuant to § 1 to reduce their rates, let us say, from *any point* in Texas (other than Fort Worth) or Oklahoma to points in Louisiana or to the Mississippi River crossings at Memphis, Vicksburg and New Orleans, so resort was had to a misuse of the powers conferred by § 4 to achieve that desideratum.

We grant that the effective date of the denial of fourth-section relief was later postponed from time to time until after the Bill of Complaint herein was dismissed, but that is beside the point, as such denial operated on the rates not otherwise subject to the active jurisdiction of the Commission when later it did become effective, compelling their reduction to the lower prescribed level, their present status. Nor has the case become moot in consequence of the grant of temporary fourth-section relief, since that order necessarily related only to the rates directly within the issues

embraced in the consolidated proceedings and did not extend to the rates on horses and mules in the Southwest other than to and from the primary markets,—and only partially even as to them. Thus, except as to points in differential territory, only the rates *from* Wichita and Kansas City were actively in issue, and the rates neither *to* nor *from* Oklahoma City were involved.

Neither are appellees on solid ground in saying on page 47 of their brief that "it is doubtful if a carrier would be heard to contend in court that it had a legal right to violate the terms of a prohibitory statute." That but begs the question raised by appellants. Their grievance lies in the fact that they were confronted with the necessity of complying under penalty with an order of the Commission which compelled them to violate § 4 in the absence of a further order affording them sufficient relief to enable them to establish the rates prescribed in the first order.

We next come to the proposition urged by appellees (page 49) that the Commission does not establish routes but merely prescribes the rates and leaves the method of applying same to the carriers. This, however, is again merely to beg the question. Thus, in Exhibits AR-1 to AR-9 submitted by appellants with particular reference to the fourth-section feature will be found several instances in which the rates prescribed by the Commission are based upon rate-making *distances* which in no sense of the word, either from a legal or from a practical standpoint, can be regarded as *routes*, and the only *routes* by which the carriers could be compelled to establish and apply the rates so prescribed would frequently give rise to fourth-section departures at intermediate points as to which rates produced by the rate-making *distances* would be in excess of the prescribed rates to more distant points.

Unquestionably, the assailed rate order of the Commission makes it compulsory upon the carriers to establish the rates therein prescribed via *some* route or routes, and as the matter now stands they rest under the obligation to

prove to the satisfaction of the Commission in the manner specified in its Rules of Practice that the prescribed rates to the more distant points are reasonably compensatory and that they are entitled to the full measure of the prescribed rates at the intermediate points. This, we respectfully maintain and insist, is to impose an undue and wholly unwarranted burden upon the carriers. When the Commission assumes the rôle of rate-maker, it should at the same time assume, and we contend that under the law it must assume, the duty and obligation of affording adequate fourth-section relief along with the rates it prescribes or else of prescribing routes which do not contravene any section of the statute, including §§ 3, 4 and 15.

Let us take another illustration of the "routeless rates" which the Commission, according to opposing counsel, has ordered the carriers to publish. It will be noted from Exhibit AR-2 that the rate-making distance from Fort Worth, Texas, to Shreveport, La., is composed of the Texas & Pacific to Waskom, Texas, and the L., A. & T. beyond. This, however, is not a practical route, nor one which the Texas & Pacific could be required to observe, since it has a line of its own extending from Fort Worth to Shreveport, that being the short single-line route between those points. But there are two other practical single-line routes between Fort Worth and Shreveport, namely, the T. & N. O., shown in red on the exhibit, and the Cotton Belt, not colored, extending from Fort Worth in a northeasterly direction through Texarkana to Lewisville, Ark., and thence southwardly to Shreveport. Each of these lines is privileged to participate in the handling of the traffic between Fort Worth and Shreveport, and at the same time is entitled to the higher rates provided by the prescribed scale at intermediate points, but without adequate fourth-section relief each would be compelled to forego the Fort Worth-Shreveport traffic or else apply the Fort Worth-Shreveport rate as a maximum at intermediate points, thereby incidentally

giving rise to a charge of undue preference and prejudice under § 3.

In short, the entire argument of appellees is based upon the unsupportable premise that, when the Commission becomes rate maker under the powers conferred upon it by the Transportation Act, 1920, the carriers nevertheless continue to be the route makers. The error in this thought is patent. Rates and routes can not exist as things separate and apart from each other. Consequently, when the Commission takes over the rôle of rate maker it must assume the duty to fix routes and to grant fourth-section relief as to all routes in respect of which the Commission-made rates automatically create departures from § 4.

We think that little need be said regarding the laborious effort of counsel to make a point (pages 50-52) of the alternative prayer of the carriers that the Commission grant a further hearing should it not feel at liberty to take note of the changed conditions brought to its attention in their petition for rehearing. While the language used may have been somewhat inept, the thought expressed had reference to the holding of this Court that the Commission may not give consideration to matters not made a part of the record, and since the petition was denied the presumption must be indulged that the Commission in fact concluded that it was not permissible for it to consider such extraneous evidence in recognition of this legal limitation upon its authority.

We lastly come to the testimony elicited by Examiners Simons and Carney and reproduced by appellees on pages 56 and 57 of their brief, which appellants alluded to in their brief as straws "that point the way the wind blows." If further proof is needed to substantiate this assertion we have only to revert to the record. Thus, after he had prodded this "admission" from the lips of the obliging witness, Examiner Simons exultingly announced in his proposed report (R. 1027) that "The shippers and shipping organizations represented at the hearing are unanimously of the

opinion that the rates on horses and mules should be related to the rates on cattle, preferably 115 per cent," and that expression was brought forward (R. 89) almost word for word in the 1933 report of the Commission. Further comment would be supererogatory.

Appellees have signally failed to clear the orders of the Commission of the illegality with which they are charged by appellants, and they should accordingly be declared null and void.

Respectfully submitted,

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